IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

FRIDAY, THE 1ST JUNE 2007 / 11TH JYAISHTA 1929

WP(C).No. 35606 of 2004(L)

OS.12/2000 of II ADDL.SUB COURT,ERNAKULAM

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PETITIONER:

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1. MARIYA CEMENTS, MATHA SHOPPING COMPLEX, TRIPUNITHURA, ERNAKULAM, REP. ITS PARTNER.

2. P.Z.PAULOSE, S/O.P.K.ZAKARIA, AGED 48 YRS., MARIYA CEMENTS, TRIPPUNITHURA.

BY ADV. SRI.A.T.ANILKUMAR

RESPONDENTS:

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1. MALABAR CEMENTS LIMITED, HAVING ITS REGISTERED OFFICE AND HEAD OFFICE AT WALAYAR, PALAKKADU, REP. BY SALES MANAGER IN CHARGE.

2. DR.M.P.MATHAI KUNJU, S/O.KORAH PAILEY, PARTNER, MARIYA CEMENTS, TRIPUNITHURA.

(R2 IS DELETED FROM THE ARRAY OF PARTIES AT THE RISK OF THE PETITIONER VIDE ORDER DATED 23.1.2006)

BY ADV. SRI.B.S.KRISHNAN(SR.)
SRI.K.ANAND (A.201)
SMT.LATHA KRISHNAN

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 01/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

WPC NO. 35606/2004

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P1: COPY OF THE PETITION I.A. NO.3281/2004 DATED 28.7.2003.

EXT.P2; COPY OF THE ORDER DATED 29.6.2004 IN I.A. NO. 3281/2004

/TRUE COPY/

PIUS C. KURIAKOSE, J.

W.P.(C) NO. 35606 of 2004

Dated this the 1st day of June 2007

JUDGMENT

Ext.P2 order passed by the learned Subordinate Judge on an application for direction to produce documents filed by the defendants 1 and 2 in a suit for recovery of money allegedly due from the defendants to the plaintiff M/s. Malabar cements is under challenge in this proceedings under Article 227 initiated by the defendants. Though the proper provision of law to be invoked was Order XI Rule 14 of the Code of Civil Procedure the petitioners quoted provision wrongly as Order XIII Rule 1. The application was filed during the course of the cross examination of the first witness examined on behalf of the defendants. In fact DW1 was confronted with certain documents which according to the respondent company were purchase orders issued by the defendants in respect of a part of the plaint claim. At that juncture marking of the documents was objected and

Ext.P1 application was filed. Prayer in Ext.P1 is to direct the respondent company to produce the originals of the consignee receipts pertaining to the purchase orders with which DW1 was confronted. In response to Ext.P1 the respondent company produced the originals of the purchase orders along with their counter affidavit. As regards the original of the consignee receipt, they contend that nothing is stated in the affidavit in support of the application regarding the original of the consignee receipts. On reading through the impugned order it is seen that the above contention found favour with the learned subordinate judge.

2. A copy of the counter affidavit filed by the learned counsel for the respondent is placed before me by Sri.AnilKumar. The Counter affidavit will show that it is not contended therein that the respondent company is not possessed of the original of the consignee receipts. The contention on the contrary is technical in the sense that the affidavit lacks in requisite averments.

3. I cannot blame the learned subordinate Judge for insisting that the affidavit in support of application for compelling the opposite side to produce documents should contain an averment to the effect that the said party is in possession of the document and that production of the document is relevant to the matter in dispute in the suit. The affidavit in support of Ext.P1 was lacking in such averment in so far as they pertain to the original of the consignee receipts sought to be produced. But the fact remains that the request was for production of consignee receipts in respect of the purchase order. It appears that the petitioners have a case that the purchase orders which have been produced are not genuine. Sri. Anil Kumar counsel for the petitioners submits that the petitioners are ready to produce a better affidavit in support of the application.

I am of the view that the petitioners should be permitted to file such an affidavit. Under these circumstances, I set aside the impugned order Ext.P2 and direct the learned Subordinate Judge to pass fresh orders on the same provided the petitioners file a better affidavit in support of the application within two weeks

from today. Copy of the affidavit to be filed in response to this order will be served on the respondent plaintiff who will be permitted to file counter affidavit. Fresh orders will be passed by the learned Subordinate Judge after hearing both sides at the earliest and at any rate within one month of receiving a copy of this judgment.

The Writ Petition is allowed as above . No costs.

PIUS C. KURIAKOSE,
JUDGE.

dpk